82-925

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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1982

DAVID D. DALY, M.D.,

Petitioner

v.

CHARLES C. SPRAGUE, M.D.,
FREDERICK J. BONTE, M.D.,
ROGER N. ROSENBERG, M.D.,
THE UNIVERSITY OF TEXAS
BOARD OF REGENTS, INDIVIDUALLY AND
IN THEIR RESPECTIVE CAPACITIES,
HOWARD RICHARDS
DAN C. WILLIAMS
JON NEWTON
JAMES L. POWELL
THOMAS H. LAW
WALTER G. STERLING
JESS HAY
JANE W. BLUMBERG
STERLING H. FLY, JR., M.D.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Fifth Circuit Court of Appeals' holding, that the removal of a Physician's clinical privileges is not a deprivation of a property or liberty interest under the Fourteenth Amendment, in conflict with the holdings of this Court in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) and *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)?

2. Does the Fifth Circuit Court of Appeals' disposition of Petitioner's 42 U.S.C. §1983 claim for violation of his First Amendment rights of free speech to question accounting irregularities, his Fourteenth Amendment rights to due process in the removal of his clinical privileges, and his Fourteenth Amendment rights for equal treatment as a tenured professor, conflict with this Court's holding that claims under 42 U.S.C. §1983 should be liberally and beneficially construed as articulated in *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); and *Owen v. City of Independence, Mo.*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)?

3. Does the Fifth Circuit Court of Appeals' refusal to recognize Petitioner's claims under 42 U.S.C. §1985(2) conflict with the positions of the District of Columbia, Third and Ninth Circuit Courts of Appeals which hold that invidious racial or class based discrimination is not a necessary element for all claims under that section?

4. Does the Fifth Circuit Court of Appeals' refusal to recognize Petitioner's claims under 42 U.S.C. 1985(2) (second portion) and (3) (second portion) conflict with this Court's holding that the remedies for violations of §1983 should be liberally and beneficially construed as articulated in *Gomez v. Toledo*, 446 U.S. 635, 100

S.Ct. 1920, 64 L.Ed.2d 572 (1980); and *Owen v. City of Independence, Mo.*, 445 U.S. 622, 100 S.Ct., 1398, 63 L.Ed.2d 673 (1980)?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The parties to the proceedings in the United States Court of Appeals for the Fifth Circuit were Dr. David D. Daly, Dr. Charles C. Sprague, Dr. Frederick J. Bonte, Dr. Roger N. Rosenberg, The University of Texas Board of Regents, Individually and in their respective capacities, Howard Richards, Dan C. Williams, Jon Newton, James L. Powell, Thomas H. Law, Walter G. Sterling, Jess Hay, Jane W. Blumberg and Dr. Sterling H. Fly, Jr., M.D.

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OPINIONS BELOW

The Order of the United States District Court for the Northern District of Texas, Dallas Division, granting Defendants' Motion for Summary Judgment, and the Judgment sustaining Defendants' Motion to Dismiss were entered April 30, 1981. They were not reported, but appear in Appendix A.

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit, affirming in part and reversing and remanding in part the Judgment of the District Court was rendered May 14, 1982. It is reported at 675 F.2d 716 and appears in Appendix B.

The Per Curiam Order of the United States Court of Appeals for the Fifth Circuit denying the Petition for Panel Re-Hearing filed by Plaintiff-Appellant Daly, rendered August 25, 1982, appears in Appendix C.

JURISDICTION

Dr. Daly filed his Original Complaint on August 31, 1979, against the named Defendants, in the United States District Court for the Northern District of Texas, Dallas Division.

On April 30, 1981, the District Court for the Northern District of Texas, Dallas Division, entered an Order granting Defendants' Motion for Summary Judgment and entered a Judgment sustaining Defendants' Motion to Dismiss (App. A.)

The United States Court of Appeals for the Fifth Circuit affirmed in part and reversed and remanded in part on May 14, 1982 (App. B). A timely Petition for Panel Rehearing was thereafter denied by the Court of Appeals on August 25, 1982 (App. C). This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PROCEDURE INVOLVED

The Constitutional provisions, statutes and rules of procedure involved are U.S. Constitution, Amendment I; U.S. Constitution, Amendment XIV; 42 U.S.C. §1983; 42 U.S.C. §1985; 42 U.S.C. §1986; Federal Rules of Civil Procedure, Rules 54, 56, 57, 58 and 65; Texas Education Code 65.02; Texas Education Code §65.31. A copy of each appears in Appendix D.

STATEMENT OF THE CASE

42 U.S.C. §1983 and the other civil rights statutes were conceived to reflect the very essence of our democracy. These statutes separate our country from totalitarian governments. Individuals are important, dignified persons and must be treated as such. To keep the statutes from being hypocritical rhetoric, they must be liberally and beneficially construed.

The controversy giving rise to the instant lawsuit centers upon the practice employed by a branch of the University of Texas of removing the clinical privileges of physicians on its staff without providing due process hearings as required by the Fourteenth Amendment, and by utilizing the removal of clinical privileges as a means to curtail the exercise of the right of a physician to question accounting irregularities within the school of medicine, as guaranteed by the First Amendment. This case also involves a conspiracy to retaliate against the Petitioner for prosecuting this suit.

The Petitioner, Dr. David D. Daly (Daly), is a tenured professor and physician in the Department of Neurology at the University of Texas Southwestern Medical School which is a part of the University of Texas Health Science Center

of Dallas, which, in turn, is a part of the University of Texas System. The University of Texas System is an entity of the State of Texas.

Daly was born in 1919. He is eminently qualified as an expert in the field of neurology and has published numerous books on the subject. He holds several degrees, including M.D. and Ph.D. degrees from the University of Minnesota. For many years he was associated with the University of Minnesota and the Mayo Clinic. From 1961 to 1966, he was Chairman of the Division of Neurology and Electronencephalography, Barrow Neurological Institute — Phoenix, Arizona. Since 1966, Daly has been employed as a professor at Southwestern Medical School at Dallas. In addition to teaching courses and giving lectures, his duties as a professor required that he treat patients and consult with other physicians. The treatment of patients, the consultation with other physicians, and the pursuit of his teaching assignments were carried out at various hospitals in the Dallas area and, as such, required that he exercise clinical privileges of a physician at those hospitals.

The revenues generated from patients treated by members of the medical staff at the Southwestern Medical School went into a special fund called MSRDP. This fund was used by the Medical School to supplement faculty salaries and to provide fringe benefits to faculty members. The various departments at the Medical School kept their own separate records regarding each physician's performance in producing revenues for the MSRDP program for use in planning budget supplements.

The Defendant Dr. Roger N. Rosenberg (Rosenberg) was Chairman of the Department of Neurology and was Daly's immediate superior at the Southwestern Medical School. He was also in charge of the MSRDP fund of the Depart-

ment of Neurology and was primarily responsible for its accounting.

Beginning in October of 1978 a dispute developed between Daly and Rosenberg regarding the accounting of MSRDP funds. Daly discovered that not only was he not receiving credit for all of the income generated by him but, in addition, there were serious accounting irregularities involving the MSRDP program in the Department of Neurology.

On June 12, 1979, Daly sent a letter to Rosenberg in which he pointed out some of these discrepancies and requested an accounting (App. F). Shortly thereafter, on June 16, 1979, Rosenberg sent a letter to Daly in which he asserted several contrived and unspecific complaints and informed Daly that his clinical privileges had been removed (App. G). Daly contends that the removal of his clinical privileges was a reprisal for his actions in questioning the management of the MSRDP fund and in requesting an accounting.

Shortly after being notified of the removal of his clinical privileges, Daly went to see the Defendant Dr. Charles C. Sprague (Sprague), the President of the University of Texas Health Science Center of Dallas, to request a clarification of the meaning of the action taken against him. At this conference he was told by Sprague that he could not communicate with any of his patients.

After Daly sought the aid of an attorney and sent two letters to Rosenberg strongly objecting to the actions taken against him, Rosenberg wrote a letter to Daly dated July 17, 1979, in which he restored Daly's clinical privileges.

The removal of a physician's clinical privileges is a serious matter which permanently impugns his reputation and

adversely affects his employment and his potential for employment. This is admitted by two of the Defendants, Sprague and Dr. Fred J. Bonte (Bonte) former Dean of the Southwestern Medical School, in their depositions. A physician's right to pursue his profession through the exercise of his clinical privileges is a property interest protected by the Fourteenth Amendment.

The Rules and Regulations of the University of Texas System established by the Board of Regents have no provisions governing the removal of clinical privileges. In his complaint Daly requests that all of the Defendants be enjoined from depriving staff personnel of constitutionally protected rights and requests that the Board of Regents be ordered to formulate Rules and Regulations governing the removal of clinical privileges that meet the requirements of due process.

Subsequent to the filing of this complaint, the Defendants have conspired to retaliate against Daly for bringing this action, within the meaning of 42 U.S.C. §1985(2). The Defendants have failed to pay him in accord with other professors of equal rank; they have conspired with Lynn Taylor, a lawyer for the University of Texas System, to place him under a special program of surveillance with the express purpose of bringing about his dismissal; they have eliminated all secretarial and clerical assistance to him alone; they have permitted the support members of the staff at the Medical School to give false and misleading information to his patients concerning his schedules or whereabouts; and they have refused to pay his travel expenses for scheduled speaking engagements benefitting the Medical School.

The District Court sustained the Defendants' Motion to Dismiss or Motion for Summary Judgement (App. A). On

appeal, the Fifth Circuit affirmed the judgment of the trial court except insofar as it denied Daly the right to develop his case for First Amendment violations of free speech resulting from his being told by Sprague that he could not communicate with any of his patients (App. B). After Daly's Motion for Rehearing was overruled, the District Court, apparently unaware that a Petition for Writ of Certiorari would be filed, has ordered the remanded portion of the case to be addressed by Motion for Summary Judgment and has specifically deferred for later consideration the question of whether the Eleventh Amendment is a bar to Daly's suit (Appendix H).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit Court Of Appeals' Holding, That The Removal Of A Physician's Clinical Privileges Is Not A Deprivation Of A Property Or Liberty Interest Under The Fourteenth Amendment, Is In Conflict With The Holdings Of This Court In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) and *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976).

On page B-17 of its opinion the Fifth Circuit discusses whether the removal of Daly's clinical privileges was a deprivation of a property or liberty interest protected by the Fourteenth Amendment. Beginning with a summary of the factual allegations, which include a statement that "the loss of clinical privileges is a serious matter to a doctor, the reason for which would be questioned in an employment interview", the Fifth Circuit concluded that Daly failed to establish that he had a property or liberty interest in the clinical privileges.

The Fifth Circuit has applied an unduly restrictive interpretation to the rule set forth in *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), and *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 570 (1972) to the effect that a claimant must allege facts to show "the existence of rules or mutually explicit understandings" that secure the benefits he seeks to protect. The Fifth Circuit noted that the Rules and Regulations of the Board of Regents of the University of Texas System describe the procedure for the termination of a tenured professor's employment (which provide due process) but that these Rules and Regulations do not address the removal of clinical privileges. The Fifth Circuit concluded that because the Rules and Regulations made no mention of clinical privileges, there was no "explicit or implicit written or oral agreement or understanding which created an entitlement to these privileges." This analysis by the Fifth Circuit overlooks the proof presented by Daly that although the Rules and Regulations of the University of Texas System had no provision for the exercise of clinical privileges, other rules and practices at the Medical School did cover the use of clinical privileges. As a physician on the staff of the Medical School, Daly was required to conduct teaching rounds at local hospitals and to participate in the MSRDP program. MSRDP was the program whereby patients were treated by physicians on the staff of the Medical School and the revenues received thereby were used to supplement the salaries funded by the state legislature. These supplements were substantial, in some cases being in excess of twenty-five percent of state funded salaries. In order to conduct teaching rounds and treat patients under the MSRDP program, a physician had to exercise his clinical privileges. Therefore, although the Rules and Regulations of the University of Texas System had no provision for the exercise of clinical privileges, the rules and

regulations of the MSRDP program made the exercise of clinical privileges a necessary function of a staff physician's employment. Furthermore, since the MSRDP program was operated similar to a trust in which each physician had a beneficial interest, it follows that the existing rules and understandings at the Medical School provided him with more than an unilateral expectation to receive its benefits — they are sufficient to support his claims of entitlement to those benefits. *Board of Regents v. Roth*, supra, at page 577.

The Defendant Bonte admitted in his deposition that the removal of clinical privileges "tells the rest of the department and all those who know about it that the individual in question, the individual involved, has given those around him cause to question his fitness for patient care." Once it is shown that Daly had an entitlement to his clinical privileges as a required adjunct to his employment and as a source of funding for salary supplements, it follows that the stigma attached to the removal of his clinical privileges is a loss of a liberty interest within the meaning of the rule set forth in *Paul v. Davis*, 424 U.S. 693, 711-12, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976). This Court in *Paul v. Davis* held that "to establish a liberty interest sufficient to implicate fourteenth amendment safeguards, the individual must be not only stigmatized, but also stigmatized in connection with a denial of a right or status previously recognized under the law."

The holding of the Fifth Circuit, that the removal of clinical privileges is not a denial of property and liberty interests under the Fourteenth Amendment, is also in conflict with the Fourth Circuit Court of Appeals in *Christhilf v. Annapolis Emergency Hospital Association, Inc.*, 496 F.2d 174 (4th Cir. 1974), and with the Sixth Circuit Court of

Appeals in *Meredith v. Allen County War Memorial Hospital Commission*, 397 F.2d 33 (6th Cir. 1968) and *Chiaffitelli v. Dettmer Hospital, Inc.*, 437 F.2d 429 (6th Cir. 1971).

II. The Fifth Circuit Court Of Appeals' Disposition Of Petitioner's 42 U.S.C. §1983 Claims For Violation Of His First Amendment Rights Of Free Speech To Question Accounting Irregularities, His Fourteenth Amendment Rights To Due Process In The Removal Of His Clinical Privileges, And His Fourteenth Amendment Rights For Equal Treatment As A Tenured Professor Conflicts With This Court's Holding That Claims Under 42 U.S.C. §1983 Should Be Liberally And Beneficially Construed, As Articulated in *Gomez v. Toledo*, 446 U.S. 635, 100 S. Ct. 1920, 64 L.Ed. 572 (1980); and *Owen v. City of Independence, Mo.*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed. 673 (1980).

This Court, after an analysis of the Congressional intent and the legislative history of §1983 and its predecessor, the Civil Rights Act of 1871, has concluded that the underlying principle of §1983 is to redress wrongs suffered by the individual at the hands of the state, or one of its institutions. Perhaps the most appropriate and current statements of this principle are contained in the cases of *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed. 572 (1980); and *Owen v. City of Independence, Mo.*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed. 673 (1980).

In *Owen*, this Court confirmed the previously established doctrine that §1983 is to be broadly construed and its language expansively interpreted. The Opinion quoted with approval the words of Representative Shellabarger, the author of the House bill which became §1983:

> This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficially construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation ... the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as *are meant to protect and defend and give remedies for their wrongs to all people. Owen*, 445 U.S. 622, ——, 100 S.Ct. 1398, 1408, 63 L.Ed.2d 673, —— (1980) (emphasis added).

The theme of §1983, as set forth by this Court in *Owen*, was its function as an aid in protecting the individual against the actions of persons acting under color of title of law and that a "damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees." *Owen*, supra, at ——, 1415, ——.

In *Gomez*, a case decided subsequent to *Owen*, this Court cited its own opinion in *Owen* as controlling on the purpose and construction of §1983 and stated there: "As remedial legislation, §1983 is to be construed generously to further its primary purpose". *Gomez* 446 U.S. 635, ——, 100 S.Ct. 1920, 1923, 64 L.Ed.2d 572, —— (1980).

The Fifth Circuit Court of Appeals failed to construe broadly the scope of §1983 in disposing of Petitioner's claims. The Court of Appeals correctly recognized Daly's claim that while acting under color of law as state officials, Defendants violated his First Amendment right of free speech when they forbade him from communicating with his patients. However, the Court of Appeals severely restricted

Daly's First Amendment cause of action by stating that Daly had not sufficiently presented his claim to the District Court that his First Amendment rights had been violated in retaliation for his questioning of the accounting of the MSRDP fund. In Daly's Original Complaint he alleged a cause of action for redress of a violation of his First Amendment rights. The record before the District Court also contains allegations where Daly states that in retaliation for having questioned the accounting irregularities his clinical privileges were removed and he was told not to communicate with his patients. At the time the Fifth Circuit wrote its opinion, this Court had declared that it was unlawful for State officials to punish a teacher for exercising his rights of free speech. See *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1721, 20 L.Ed.2d 811 (1968). These allegations were consistently presented and urged upon the District Court. In failing to give consideration to the pleadings, the evidence in the record, and case authorities the Court of Appeals acted in contravention to the letter and spirit of §1983 by failing to liberally and beneficially construe such a claim.

Additionally, the Court of Appeals denied Daly the benefit of a broad and expansive reading of §1983 when it failed to recognize the removal of Daly's clinical privileges as a deprivation of rights under the Fourteenth Amendment, as was developed in Section I. In its opinion the Court declared that Daly had not alleged facts sufficient to establish a property interest in his clinical privileges. This statement ignored Daly's allegations set forth at several points in the record. At such points, Daly alleged the impact and effect of the removal of clinical privileges upon his reputation and future employment, and that the removal of these clinical privileges

had the effect of preventing Daly from practicing his livelihood. The Court of Appeals, in concluding that such allegations did not show the existence of a property or liberty interest, failed to construe Daly's claim as broadly as this Court has held that §1983 requires.

Finally, the Court of Appeals failed to follow the principles espoused in *Gomez* and *Owen* when it refused to correct the District Court's failure to recognize Daly's request for injunctive and declaratory relief, and its refusal to permit Daly additional discovery. Daly, in his Original Complaint, prayed for an injunction against the Defendants from undertaking further actions depriving him and others similarly situated of their First and Fourteenth Amendment rights, for declaratory relief, and for an order directing the Regents of the University of Texas to formulate rules and regulations governing the removal of clinical privileges. During the course of the proceedings, Daly requested that he be allowed discovery of Defendants' activities after suit was filed. The District Court refused to permit such discovery, declaring such information irrelevant. The Fifth Circuit affirmed this denial of Daly's discovery rights. Both courts failed to consider Daly's claim for injunctive relief, which should have entitled him to discovery of the Defendants' conduct subsequent to the filing of the suit. See *Civil Aeronautics Board of Civil Aeronautics Authority v. Canadian Colonial Airways, Inc.*, 41 F.Supp. 1006 (S.D. N.Y., 1940); *Carlson Companies, Inc. v. Sperry & Hutchison Co.*, 374 F.Supp. 1080 (D.C. Minn., 1973). Both courts also failed to consider the scope the rules of discovery are intended to have. To facilitate the development of issues for trial, discovery rules "are to be accorded a broad and liberal treatment." *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 391, 91 L.Ed.2d 451, 460 (1947). See also Wright & Miller, *Federal Practice and Pro-*

cedure: Civil §2008. The District Court ignored these claims and declined to mention them in its order granting Defendants' Motion for Summary Judgment. The Court of Appeals also declined to mention these claims, and thereby disregarded the opinions of this Court directing a liberal construction of §1983.

By curtailing Daly's claims under the First Amendment, and rejecting altogether his claims under the Fourteenth Amendment, the Court of Appeals has unduly restricted the application of §1983 and has denied Daly the benefit of the remedy which the statute was enacted to provide.

III. The Fifth Circuit Court Of Appeals' Refusal To Recognize Petitioner's Claims Under The First Portion Of 42 U.S.C. §1985(2) Conflicts With The Positions Of The District Of Columbia, Third And Ninth Circuit Courts Of Appeals Which Hold That Invidious Racial Or Class Based Discrimination Is Not A Necessary Element For All Claims Under That Section.

Much has been written by lower courts regarding what this Court meant in *Griffin v. Breckinridge*, 403 U.S. 88, 91 S.Ct. 1970, 29 L.Ed.2d 338 (1971).

Daly believes that the retaliatory measures taken by the Defendants subsequent to his filing this lawsuit constitute a violation of §1985, and more particularly, the first portion of §1985(2) which reads as follows:

> "(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property

on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror(.)"

The Fifth Circuit avoided any mention of 42 U.S.C. §1985 in its opinion rendered on May 14, 1982, thereby refusing to reverse the District Court which had denied Daly any relief under §1985. However, the Fifth Circuit's position on the question of whether a racial or class-based discriminatory animus is required in an action under Section §1985(2) is set forth in its en banc opinion in *Kimble v. McDuffy*, 648 F.2d 340 (5th Cir. 1981). In *Kimble* the Fifth Circuit held that it was necessary for a claimant under §1985 to demonstrate a racial or class-based motive. As evidenced by their holding rendered in *Kimble* the judges of the Fifth Circuit are in disagreement regarding the meaning of 42 U.S.C. §1985 in light of their perception of *Griffin*. Eleven of the twenty-four justices on the en banc panel in *Kimble* opposed the majority and expressed the belief that no racial or class based discriminatory animus is required for the first part of §1985(2). Furthermore, the rule expressed by the majority of the judges on the Fifth Circuit is in conflict with the position taken by the District of Columbia Circuit in *McCord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980), cert. denied, 451 U.S. 983 (1981); with the Third Circuit in *Brawer v. Horowitz*, 535 F.2d 830 (3rd Cir. 1976); and with the Ninth Circuit in *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), cert. granted. The Eighth Circuit in *Jones v. United States*, 536 F.2d 269 (8th Cir. 1976) is in accord with the Fifth Circuit.

The Fifth Circuit has demonstrated a strong reluctance to deal with §1985 questions due to its confusion regarding

Griffin's impact. The Fifth Circuit demonstrated this reluctance by its failure to reverse the District Court's action in denying discovery of facts that occurred after the original filing of this lawsuit.

In Daly's Answer to Defendants' Motion for Summary Judgment, Daly alleged that the Defendants have maintained an ongoing conspiracy the object of which is to bring about Daly's dismissal as an obvious reprisal to his maintenance of this suit.

The actions taken by Defendants after he filed this suit include the following:

(1) Defendants have paid Daly substantially less than other professors of equal rank in the Department of Neurology. In fact, at least seven *Associate* Professors, three *Assistant* Professors, and three others in Daly's department of lesser rank than Daly received greater compensation than Daly.

Defendants have also deprived Daly of receiving any additional supplemental compensation from the MSRDP fund. About twenty Professors, Associate Professors and Assistant Professors are being paid from $678.00 to $21,014.00 from the MSRDP fund this current year.

These facts are shown in the Budget for 1982-83 of the University of Texas Health Science Center of Dallas, at pp. 158 through 166.

(2) Defendants placed Daly under a special program of surveillance not applicable to other members of the faculty, with the express purpose of searching for and documenting any conduct on the part of Daly which could bring about his dismissal. The implementation of this special program of surveillance is documented by a memorandum written by the Defendant Bonte, a copy of which is attached as Appendix E.

(3) Defendants curtailed and then eliminated entirely all clerical support for Daly. These services, which were available to other members of the faculty, were essential to Daly's performance of his duties as a member of the faculty.

(4) Defendants permitted members of Defendants' support staff at the Medical Center to give false and misleading information to Daly's patients concerning his schedules and whereabouts.

(5) Defendants arbitrarily refused to honor previously authorized travel plans and expenses for Daly's speaking engagements and technical association meetings in various parts of the country, which were for the benefit of the Medical School.

Daly has not attempted to offer proof of an existence of a racially or class based invidiously discriminatory animus. It is Daly's belief that various lower Courts, including the Fifth Circuit, have misconstrued the holding of this Court in *Griffin* as requiring a claimant to demonstrate the existence of a racial or class-based discriminatory animus to bring a cause of action under §1985(2). Daly asserts that *Griffin* stood for the proposition that under the particular facts involved, and where the claim is brought under §1985(3), a litigant is required to demonstrate some nexus to a federal question. In *Griffin* the federal question related to a racial or class-based invidiously discriminatory animus.

Daly asserts that the drafters of §1985, particularly with respect to the first portion of §1985(2), did *not* intend to deny claimants redress for wrongs committed against them if they failed to demonstrate a class based or racially discriminatory animus as an element of their cause of action.

The legislative purpose behind §1985, as articulated in *Griffin*, merely intended that there be a nexus demonstrated

between the proscribed activity and a violation of a federally protected right. The first portion of §1985(2) has a federal nexus built in — the protection of litigants in federal court proceedings.

Because of the division among the Circuit Courts regarding the scope of §1985(2) and the disagreement regarding their interpretation of *Griffin*, there is a present need for this Court to provide clarification and guidance.

IV. The Fifth Circuit Court Of Appeals' Refusal To Recognize Petitioner's Claims Under 42 U.S.C. §1985(2) (second portion) and (3) (second portion) Conflicts With This Court's Holding That The Remedies For Violations Of §1983 Should Be Liberally And Beneficially Construed As Articulated In *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980); and *Owen v. City of Independence, Mo.*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980).

As this Court has articulated in *Gomez v. Toledo*, 446 U.S. 635, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980), and *Owen v. City of Independence*, Mo., 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), the underlying purpose of §1983 and its predecessor, the Civil Rights Act of 1871, is to aid in the preservation of human liberty and human rights.

The Fifth Circuit in the case at bar failed to perceive that §1983 was intended by Congress to be construed liberally and beneficially.

Daly believes that when Defendants Rosenberg, Sprague and Bonte acted in concert under the color of their positions as officials of the State of Texas, in removing Daly's clinical privileges, they were in violation of §1985, and more par-

ticularly the last portions of §1985(2) and (3) which state as follows:

2nd Portion of §1985(2)

> if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

2nd portion of §1985(3)

> to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

If the words of §1985 are to be given their full meaning, they must be interpreted to mean that whenever two or more persons conspire to injure a person in violation of §1983, such as Daly has alleged in the case at bar, such persons are *also* in violation of §1985.

In *Gomez*, citing *Owen*, and quoting with approval the legislative purpose as expressed by Representative Shellabarger, this Court enunciated the importance of §1983:

> " 'This statute, enacted to aid in the preservation of human liberty and rights; (citations omitted) reflects a

congressional judgment that a damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees;' (citation omitted). *As remedial legislation, §1983 is to be construed generously to further its primary purpose* (citations omitted) (Emphasis added).

Based upon this Court's opinion on §1983 as expressed in *Gomez* and *Owen*, Daly asserts that if §1983 is to be construed liberally as intended, this Court should find that if two or more persons conspire to injure a person in violation of his rights under §1983, they also are violating §1985. Defendants, in conspiring to violate the §1983 rights of Daly, also have violated §1985.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED this 23rd day of November, 1982.

WINIKATES & CURTIS

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CERTIFICATE OF SERVICE

STATE OF TEXAS)
) ss.
COUNTY OF DALLAS)

Charles J. Winikates, being first duly sworn upon his oath, deposes and says that he is a member of the Bar of this Court and one of the counsel of record for petitioner in this cause; that on this 23rd day of November, 1982, he mailed three copies of petitioner's Petition for a Writ of Certiorari in this cause by depositing same in the United States mail, first-class postage prepaid to:

Laura S. Martin
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711

and that he also ~~mailed~~ IS MAILING forty copies of petitioner's Petition for a Writ of Certiorari to the Clerk of this Court, first-class postage prepaid; all in compliance with Supreme Court Rule 28.

Charles J. Winikates

SUBSCRIBED AND SWORN to before me this 23rd day of November, 1982.

Notary Public

My Commission Expires:

10-05-85